



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

Commission Statement Concerning a Request for an Interpretation as to Whether a Particular Agreement is a Swap, Security-Based swap, or Mixed Swap

AGENCY: Commodity Futures Trading Commission.

ACTION: Commission statement.

SUMMARY: The Commodity Futures Trading Commission (the “Commission”) is publishing this statement concerning a request for an interpretation as to whether a particular agreement is a swap, security-based swap, or mixed swap.

FOR FURTHER INFORMATION CONTACT: Eileen T. Flaherty, Director, (202) 418-5326, eflaherty@cftc.gov; Frank Fisanich, Chief Counsel, (202) 418-5949, ffisanich@cftc.gov; or Jacob Chachkin, Special Counsel, (202) 418-5496, jchachkin@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Statement

On February 7, 2017, Commission staff received a letter from Breakaway Courier Corporation (“Breakaway”), through its counsel, requesting a joint interpretation from the Commission and the Securities and Exchange Commission (“SEC”, and, together with the Commission, the “Commissions”) pursuant to Commission regulation 1.8 as to whether a particular agreement is a swap, security-based swap, or mixed swap.¹ Breakaway’s request relates to a contract labeled as a Reinsurance Participation Agreement (“RPA”), which it has previously executed with Applied Underwriters

¹ See 17 CFR 1.8.

Captive Risk Assurance Company, Inc. (“AUCRA”).² According to Breakaway’s submission, it entered into two RPAs with AUCRA, one of which has a stated effective date of July 1, 2009, and the other of July 1, 2012.

The Commission and the SEC jointly adopted Commission regulation 1.8 and Securities Exchange Act of 1934 (“Exchange Act”)³ Rule 3a68-2 in 2012⁴ pursuant to Section 712(d)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).⁵ The rules established a process for parties to request a joint interpretation as to whether a particular agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or mixed swap. Among other things, the rules set forth the information required to be included in a request and a process for withdrawing a request. Commission regulation 1.8 also includes requirements governing the manner and timing by which the two agencies must act after the receipt of a complete submission under the rule, if they determine to issue such joint interpretation. In addition, paragraph (e)(5) of Commission regulation 1.8 provides that “[i]f the Commission and the [SEC] do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) [of the rule], each of the Commission and the [SEC] shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes.”⁶

² A copy of Breakaway’s submission may be found at:
<http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankFinalRules/index.htm>.

³ 15 U.S.C. 78 *et seq.*

⁴ See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (Aug. 13, 2012) (“Product Definitions Adopting Release”).

⁵ See Dodd-Frank Act, Pub. L. 111-203, 124 Stat. 1376 (2010). All references to “Title VII” in this statement shall refer to Title VII of the Dodd-Frank Act, which established a comprehensive new regulatory framework for swaps and security-based swaps.

⁶ Paragraph (e)(5) of SEC Rule 3a68-2 contains identical language (other than reversing the references to the two commissions). See 17 CFR 240.3a68-2.

Pursuant to paragraph (e)(5) of Commission regulation 1.8, the Commission is declining to issue a joint interpretation with the SEC in connection with Breakaway's request.⁷ The Commission understands that the status of the RPAs is already subject to ongoing private litigation and that the petitioners' request may bear directly on that litigation. We believe that the Commission regulation 1.8 process is not an appropriate vehicle for litigants such as Breakaway to obtain the views of the Commission in connection with issues in ongoing litigation, and we therefore decline Breakaway's request that we state an interpretive position as to the proper characterization of the RPAs.⁸

Issued in Washington, DC, on June 7, 2017, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

**Appendix to Commission Statement Concerning a Request Made Pursuant to
Commission Regulation 1.8 – Commission Voting Summary**

On this matter, Acting Chairman Giancarlo and Commissioner Bowen voted in the affirmative. No Commissioner voted in the negative.

⁷ Commission staff has consulted and coordinated with SEC staff and understands that the SEC will be issuing a separate statement on this matter.

⁸ As we and the SEC explained when we jointly adopted Commission regulation 1.8 in 2012 (as well as the corresponding rule under the Exchange Act), the purpose of Commission regulation 1.8 is to “afford market participants with the opportunity to obtain greater certainty from the Commissions regarding the regulatory status of particular Title VII instruments under the Dodd-Frank Act. This provision should decrease the possibility that market participants inadvertently might fail to meet the regulatory requirements applicable to a particular Title VII instrument.” See Product Definitions Adopting Release, 77 FR at 48295. We and the SEC also noted our belief that “it is essential that the characterization of an instrument be established prior to any party engaging in the transactions so that the appropriate regulatory schemes apply.” See Product Definitions Adopting Release, 77 FR at 48297.

